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February, 1979

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CITATIONS

STATUTES

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-575, 78-597, 78-604

SOUTHERN RAILWAY COMPANY, - - - *Petitioner*

v. **No. 78-575**

SEABOARD ALLIED MILLING CORP., ET AL. - *Respondents.*

INTERSTATE COMMERCE COMMISSION, - *Petitioner*

v. **No. 78-597**

SEABOARD ALLIED MILLING CORP., ET AL. - *Respondents.*

SEABOARD COAST LINE RAILROAD COMPANY, ET AL. - - - - - - - *Petitioners*

v. **No. 78-604**

SEABOARD ALLIED MILLING CORP., ET AL. - *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS SEABOARD COAST LINE RAILROAD COMPANY, ET AL.

Petitioners, Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, Illinois Central Gulf Railroad Company and St. Louis-San Francisco Railway Company (hereinafter jointly referred to as Railroads), file this their Opening Brief

scheduled after Court issuance of a Writ of Certiorari on January 8, 1979, to the United States Court of Appeals for the Eighth Circuit.[1]

OPINIONS BELOW

The Opinion of the Court of Appeals, reported at 570 F. 2d 1349 (1978), appears in the Appendix at pages 303-316. The action taken by the Interstate Commerce Commission, which was appealed to the United States Court of Appeals for the Eighth Circuit, is evidenced by two orders of the Commission, not reported, also included in the Appendix at pages 284-291.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 16, 1978.[2] A timely Petition for Rehearing *En Banc* was denied on May 12, 1978,[3] and timely petitions for the issuance of a Writ of Certiorari were filed by October 10, 1978.[4] This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

[1]Appendix, pp. 319-321.
[2]Appendix to ICC Petition for Issuance of Writ.
[3]Appendix, pp. 317-318.
[4]In three separate orders granting three separate petitions to the Court, the cases were consolidated. (Appendix, pp. 319-321.)

STATUTES INVOLVED[5]

Interstate Commerce Act, 49 U.S.C. §15(17) [49 U.S.C. §10727]:

> Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for all rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through re-scheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Interstate Commerce Act, 49 U.S.C. §13(1) [49 U.S.C. §11701]:

[5]On October 17, 1978, President Carter signed into law an Act to revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337. To avoid confusion, since all of the Appendix references use the former language and designations, the primary references in this Brief will be the former designations with bracketed reference to the recodified designation.

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Interstate Commerce Act, 49 U.S.C. §15(8)(a) [49 U.S.C. §10707]:

(8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the

Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

STATEMENT OF THE CASE

On August 14, 1977, the Southern Freight Association, representing railroads operating generally in the South and Southeast, (including all of the railroads submitting this Brief) filed tariff schedules containing a 20 per cent seasonal rate increase of limited duration pursuant to Section 15(17) [49 U.S.C. §10727] of the

Interstate Commerce Act.[6] This tariff, the subject of the lower court's decision, was to take effect on 30-days notice, as specifically set out in the Interstate Commerce Act[7] and was to remain in effect for 90 days, i.e., from September 15 to December 15, 1977.

At the time the rates were filed, a Justification Statement, an elective not mandatory filing, allowed by the Commission's regulations,[8] was filed. In that Statement the Railroads proved that the 3-month peak-period movement did exist and was repetitive. (Appendix, pp. 26-27, 40a.) The Railroads also provided

[6]Section 15(17) was added by Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") Pub. L. No. 94-210. In Section 202(d), Congress specifically encouraged the establishment of seasonal rates. The 4R Act further required the Commission to adopt expeditious procedures to establish railroad rates based on seasonal, regional, or peak-period demand for rail services. These procedures were intended to provide incentive to shippers to reduce peak-period congestion and, equally important, to generate additional revenue for the railroads.

[7]Interstate Commerce Act, Section 6(3) [49 U.S.C. §10762]. Under this section of the Act, a carrier may file a proposed rate increase and, unless the Commission orders otherwise, after 30 days (or such shorter period as the Commission may authorize) the rate becomes effective as a carrier-made rate. Within that 30-day period, however, the Commission may suspend the proposed rate for a maximum of seven months, pending an investigation into the lawfulness of that rate, 49 U.S.C. §15(8)(a) [49 U.S.C. §10707]. At the end of seven months, the carrier may put the new rate into effect unless the Commission, prior to that time, has completed its investigation and affirmatively found the proposed rate unlawful. While administrative power to suspend a rate pending investigation was originally fashioned in the context of railroad regulation, Congress has consciously adopted the same design in other regulatory statutes. *E.g.*, Natural Gas Act §4(e), 15 U.S.C. §717c(e); Federal Power Act §205(e), 16 U.S.C. §824d(e); Federal Communications Act §204, 47 U.S.C. §204; Motor Carrier Act §§216(g), 218(c), 49 U.S.C. §§316(g), 318(c); Water Carrier Act §201, 49 U.S.C. §§907(g), (i); Freight Forwarders Act §406(e), 49 U.S.C. §1006(e); Federal Aviation Act §1002, U.S.C. §1482(g). *See also* Intercoastal Shipping Act, 46 U.S.C. §845.

[8]49 C.F.R. §1109.10(f).

substantial information to indicate that peak-movement periods do result in severe strain in car supply and congest train movements into and out of yards resulting in costly inefficiency. (Appendix, pp. 85-88, 89-92.)

Shippers were allowed, again by regulation, from August 15 to September 6, in which to file petitions for suspension and investigation. Approximately twenty such petitions were filed to which the Railroads replied on September 8.[9]

As an unusual move, a few of the protestants chose also to file a Petition requesting rejection of the tariff itself on the basis of alleged violations of the long-and-short-haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. §4(1) [49 U.S.C. §10726]. This issue was not raised on protest under Section 15(8)(a), but was raised and argued in a separate non-verified filing styled "Petition for Rejection of Tariff Publication" which requested not that the Commission investigate to determine whether or not there were any violations but that the Commission take the drastic step of actually rejecting the filing of the tariff without investigation.[10] (Appendix, pp. 242-246.)

[9]The abbreviated time period within which Railroads could respond was the result of a holiday period which allowed an extended time to Protestants and a shortened time to Railroads.

[10]Rejection of a tariff is normally an informal matter which allows a filing party to correct an error before consideration by an administrative body. *Municipal Light Boards* v. *F.P.C.*, 450 F. 2d 1341 (D.C. Cir., 1971). In this case, the protestants were requesting that the rate publication, in essence, be permanently rejected. The Court is reminded that this particular tariff publication was made to apply during a seasonal movement of grain. Delay awaiting republication could have completely destroyed the purpose of the publication.

On September 14, the Commission, Vice Chairman Clapp and Commissioner Christian not participating, served its Decision[11] declining to suspend the rates and directing the carriers to remove unlawfulness, *if any,* which might be brought to their attention involving any violations of Section 4 of the Interstate Commerce Act. The Commission did not find that there were any violations. Also, on September 14, Division 2 of the Commission denied the Petition for rejection, as well as the Supplement to that Petition which had been filed *after* Railroads had responded to the initial petition.

Several of the protestants immediately sought and received from the lower court an *ex parte* temporary stay[12] of the Commission's order on September 14, 1977. The Courts also enjoined Railroads from permitting the rate tariffs from becoming effective. On the motion of the Interstate Commerce Commission, supported by Railroads, the lower Court received extensive oral argument on the propriety of continuing the stay in effect; and, by order entered September 22, 1977[13] the lower Court held that, although a strong showing had been made that it had jurisdiction to enter the stay, a balancing of the equities under the traditional tests of *Virginia Petroleum Jobbers Assoc.* v. *F.P.C.,* 259 F. 2d 921 (D.C. Cir., 1951), required that the temporary stay be dissolved.[14] The rates took effect at 12:01 A.M., on September 24, 1977.

[11]Appendix, pp. 286-291.

[12]Appendix, p. 295.

[13]Appendix, pp. 298-300.

[14]This exercise of equity power in relationship to a tariff publication before it is effective, therefore during the period in which

(Footnote continued on following page)

On September 16, 1978, the lower Court issued its Decision[15] finding that the Commission's failure to exercise its discretionary power to investigate the rate increase was a final agency action subject to review. The case was remanded to the Commission with specific instructions on the manner in which a hearing should be conducted. Specifically, the Court ordered the Commission to investigate *and make detailed findings* on the lawfulness of the tariff publications.[16] A request for rehearing *en banc* was filed by the Interstate Commerce Commission. The Petition, however, was denied by summary order issued on May 12, 1978.[17]

QUESTIONS PRESENTED

1) Has the Interstate Commerce Commission adjudicated the lawfulness of a railroad-initiated rate when it declines to exercise its discretionary powers under Section 15(8) of the Interstate Commerce Act to suspend and investigate a tariff publication?

(Footnote continued from preceding page)

the Commission can suspend, is specifically in conflict with the legislative intent evidenced in the passage of the Mann-Elkins Act. It is clear that the "injunctive" power accorded the Commission was *designed* as a substitute for any equitable powers the courts might possess, rather than as a supplement to those powers. *See, Hearings on Bills Affecting Interstate Commerce Before the House Interstate & Foreign Commerce Committee,* 61st Cong. 2d Sess. 438 (1910). A finding which this Court made in *Arrow Transportation Co.* v. *Southern Ry.,* 372 U. S. 658 (1963).

[15]Appendix, pp. 303-316.

[16]Appendix, p. 316. The Court is reminded that Section 15(8) provides that after a full hearing the Commission *may* issue a final order on the lawfulness of a rate; *but it is not required to do so.*

[17]Appendix, pp. 317-318.

2) Can the powers to suspend and to investigate be "separate and distinct" for the purpose of judicial review when each power, by the terms of the statute, is wholly dependent on the other for existence?

3) Has a protestant to a new rate publication exhausted its administrative remedies by the filing of a protest under Section 15(8) of the Interstate Commerce Act requesting suspension and investigation?

SUMMARY OF ARGUMENT

A. If the decision of the lower court is allowed to stand it will allow courts to usurp the power of the Interstate Commerce Commission, and several other regulatory bodies, to exercise discretion in the matter of initial informal review of tariff publications. The exclusiveness of suspension powers enjoyed by the Commission under Section 15(8) of the Interstate Commerce Act has been affirmed consistently by this Court. *Aberdeen and Rockfish R.R.* v. *SCRAP,* 422 U. S. 289 (1975) [SCRAP II]; *United States* v. *SCRAP,* 412 U. S. 669 (1973) [SCRAP I]; *Atchison, Topeka and Santa Fe Ry.* v. *Wichita Board of Trade,* 412 U. S. 800 (1973); and *Arrow Transportation Co.* v. *Southern Ry. Co.,* 372 U. S. 658 (1963).

On the specific question of review, there has been no lower court finding other than the one before the Court in this case which has questioned the exclusiveness and therefore the reviewability of a Commission decision not to suspend or not to investigate Commission determinations made strictly on the question of lawfulness under the Interstate Commerce Act.

B. One Court, the United States Court of Appeals for the District of Columbia, has determined specifically that there is no distinction between the related powers of investigation and suspension, *Asphalt Roofing Manufacturers Assoc.* v. *ICC,* 567 F. 2d 994 (1978). That Court is correct and there is no evidence in the legislative history, the practical use of the powers or common sense for treating the powers separate and distinct for any purpose. Interference with these critical discretionary powers would simply allow court intrusion into the critical area of administrative domain to the detriment of the public interest and in contravention of the National Transportation Policy. [49 U.S.C. §10101.]

C. Upholding the lower court's decision would also allow the continuous interruption of the administrative process without a requirement that petitioners to the courts exhaust the administrative remedies available to them under Section 13(1) of the Interstate Commerce Act. The lower court has virtually *become* the Interstate Commerce Commission in this case. Courts are not equipped to deal with technical determinations in disputed rate matters.

Exclusive jurisdiction in an expert body is critical to efficient rate making recently prompted by Congress in the 4R Act. Unnecessary judicial interference at the suspension stage would literally freeze the rate-making process before it begins. Congress has recognized and verbalized through legislation a very different public attitude toward the railroads of this na-

tion. This is not the time to reverse, as the lower court has done, judicial interpretation of the nature of suspension powers.

The lower court erred, railroads submit, by injecting into the administrative process solely because it disagreed with the weight afforded the evidence by the Commission. The lower court appears to have committed error because it misconstrued the nature of the proceeding it was reviewing.

ARGUMENT

I

The Interstate Commerce Commission Does Not Adjudicate the Lawfulness of a Railroad-Initiated Rate When It Declines to Exercise Its Discretionary Powers Under Section 15(8) of the Interstate Commerce Act.

An Agency's Decision to Refrain From an Investigation Is Generally Unreviewable.

While under unique and limited circumstances administrative inaction may become judicially cognizable.[18] An agency's decision to refrain from an investigation is generally unreviewable.[19] This is true even when the "power" to institute an investigation is not

[18] *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204, 226 (D.C. Cir., 1960), *cert. denied*, 364 U. S. 913 (1960).

[19] *Kixmiller* v. *S.E.C.*, 492 F. 2d 641, 645 (D.C. Cir., 1974), *Union Mechling Corp.* v. *U. S.*, 566 F. 2d 722 (D.C. Cir., 1977).

"Agency action," as defined in the Administrative Procedure Act (APA), "includes . . . failure to act," 5 U.S.C. §551(13).

committed solely to discretion of the agency as it is under Section 15(8) of the Interstate Commerce Act.[20]

Suspension by the Commission is nothing more than the issuance of a preliminary injunction[21] pending further review to determine if the injunction should be permanent. The issue raised is whether there is sufficient evidence *immediately available* to the Commission, *i.e.*, probable cause for it to take the drastic step of issuing a preliminary injunction or, in the alternative, exacting a penalty (keep account requirements)[22] pending an investigation.

It Is Unlikely That the Commission Could Make a Determination on Lawfulness in a Matter of Days When It Found, in the Past, That It Could Not Complete an Investigation Within Five Months.

The time period originally set in 1910 by the Mann-Elkins Act for the duration of a suspension was a period not to exceed 120 days, with the proviso that if the hearing could not be concluded within that period, the Commission might in its discretion extend the time for a further period not exceeding six months. The Transportation Act of 1920 retained the initial suspension period of 120 days but shortened the permissible

[20] "Agency action . . . committed to agency discretion by law" is specifically exempted from review. APA, 5 U.S.C. §701 (A)(2). Section 15(8) investigation powers are closely analogous to those in §13a(1). In *City of Chicago* v. *U. S.*, 396 U. S. 162, 165 (1969) this Court noted: "Whether the Commission should make an investigation of a §13a(1) [49 U.S.C. §10908] discontinuance is of course within its discretion, a *matter which is not reviewable.*"

[21] 45 Cong. Rec. 6500 (1910).

[22] The 1976 amendments made through the 4R Act, require the Commission to order railroads to keep account of funds to be refunded *if* the investigation determines the rate to be unlawful. The extra burden of "keeping account" is a burden on Railroads.

period for extension to 30 days.[23] The 1920 Act also authorized the Commission to require the carrier to keep accurate account in detail all amounts received by reason of an increase going into effect at the end of the period of suspension, and to require at the end of the hearing that the funds be refunded if there was a finding of unlawfulness. The Commission found the 150 days maximum for completing an investigation unrealistic and appealed to Congress to lengthen the period to the original 120 days plus a right of extension up to six months. Congress responded affirmatively in the Mayton-Newfield Act in March of 1927.[24]

The present time period within which the Commission can conduct an investigation under its suspension powers is limited by Section 15(8) to a period not to exceed seven months subject to extension only upon appeal to Congress. It is, then, totally unrealistic for the Court to determine that the Commission could react with a final order on lawfulness when, as outlined at pages 15-17, *supra,* it is possible that the Commission had less than five days to review all of the filings and less than one day to review the eleventh hour filing which was made concerning the possibility of deviations from the long- and short-haul provisions of the Act.

The suspension stage is an extremely fast paced, informal review of rate publications.[25] Because of

[23]"The increased size of the Commission in its divisional organization rendered the shortening of a suspension period feasible." 1 *Sharfman,* the Interstate Commerce Commission, 203.

[24]44 Stat. 1446, 1447 (1927).

[25]*See, Arrow,* p. 672.

time limitations, both protestants and respondents rely heavily on the Commission's expertise in the filing of what, of necessity, must be abbreviated statements of position. Since this is the only "record" upon which the Commission can make its determination on whether or not to use its Section 15(8) discretionary powers, the Court's decision would mean that courts would consistently receive truncated records upon which they would be expected to review Commission inaction.

The characteristics of pre-suspension review forecloses the possibility of an adjudication of lawfulness of a proposed rate. It is essential that this Court recognize that the limited record on which a decision is made to suspend or not to supend is the same record on which a decision to investigate or not to investigate is made. The Commission, as well as all other administrative bodies, is assumed to use its discretionary suspension powers in a reasonable way.[26]

The Nature of Review Given to a Tariff Filing Prior to Its Effective Date Forecloses the Possibility of a Finding on Lawfulness.

Since 1952, the Commission has delegated to a Board of Employees, now the Suspension and Fourth Section Board, authority to make the initial determination on the action which should be taken under the Section 15(8) powers. When a tariff change is filed,

[26]We decline to assume the Commission will afford [petitioner] an opportunity which is less than effective, or that if the facts are established the Commission will fail to find accordingly, or that if the facts are found the Commission will inaccurately apply the law to them. *Delta Air Lines* v. *Civil Aeronautics Board,* 228 F. 2d 17, 19 (D.C. Cir., 1955).

the Board, which consists of three members with a supporting staff, may enter an order of investigation and suspension, initiate an investigation without suspension, or decline to take action.

As previously observed, a tariff publication must be filed 30 days before the proposed effective date.[27] Of necessity, therefore, the Board must do its screening rapidly. In practice, it devotes almost all of its attention to those tariff filings eliciting protests from shippers or competing carriers to determine whether or not the protests meet the standards set forth in 15(8)(c)(A)-(B) [49 U.S.C. § 10707(c)(A)-(B).] Protestants' petitions for suspension normally must be filed with the Commission and served upon the publishing carrier no less than 12 days before the effective date of the tariff. The involved carrier may submit a reply, but must file and serve it at least three full work days prior to the effective date of the rate change to assure its consideration by the Board. The Board normally votes three days in advance of the effective date.

Proceedings before the Board are "informal." However, if the Board declines to suspend a published tariff change, the protestants may seek reconsideration of the decision through appeal. This request must reach the Commission, or a division thereof, no later than two work days prior to the effective date of protested matter. Thus, the Commission normally has only two days within which to review and make a determination on the proper action to take under Section

[27]§6(3) [49 U.S.C. §10762].

15(8). It is, however, general procedure for the Commission to take significant matters such as the initial publication of demand-sensitive rates, for initial decision and to therefore have a somewhat longer period of time for review. However, that period of time normally does not exceed five days.[28]

It appears that the lower court totally misconstrued the nature of "review" that is possible within the time limitations of the pre-effective stage of tariff publication. This is, of course, one of the fundamental reasons why a court should not intrude upon this purely administrative function of the Commission.[29] The very fact that the lower court relied upon *City of Chicago* v. *United States,* 396 U. S. 162 (1969), indicates the degree of misconception which it held. *City of Chicago* involved specifically a departure from an investigation which had been initiated. No investigation was initiated in this case; to the contrary, the Commission specifically declined to institute an investigation.[30]

[28]This is, of course, supposition since the internal progression of review is not actually known. However, the Board is charged with initial responsibility and it cannot review materials and send the matter up until the filing dates have passed.

[29]*Arrow,* pp. 669-670.

[30]Very simply, this case was not *ripe for review* in the lower court. The instant situation is distinguishable from that in this Court's recent ruling on a ripeness for review issue in *Duke Power Company* v. *Carolina Environmental Study Group, Inc.,* 98 S. Ct. 2620 (1978) since the Petitioners did not even claim injury from the allegations of patent illegality. The Court's ultimate decision to dissolve the stay actually concluded as much.

Section 4(1) Violations Were an Afterthought Issue Raised Before the Commission in Skeleton Form and Magnified Beyond Reasonable Proportion Before the Lower Court.

The Court specifically states in its order that it makes no findings concerning violations of the long-and-short-haul provisions of the Interstate Commerce Act. It does note that, in its opinion, the issues of patent illegalities which were raised on argument to the Court should be reviewed by the Commission on investigation. It is clear from the lower court's order that it took into consideration not only the order of the Commission declining to suspend or to investigate the seasonal increases, but also, the order of Division 2 (Appendix, pages 284-285) denying the supplemented Petition for Rejection of Tariff Publication. While the Court relied primarily on the allegations of long-and-short-haul violations made by petitioners to that Court, there was no final order from the Commission concerning that issue. The decision of Division 2 was an initial decision and, therefore, under the Commission's rules[31] did not become a final decision until the expiration of a 20-day appeal period.[32] The protestants, petitioners to the lower court, did not take advantage of an appeal under the Commission's rules; and therefore, by force of law, the Division 2 decision did become the Commission's decision on October 4, 1977. The initial decision on possible long-and-short-haul departures became final 12 days after the Court's decision to review the matter and to require the railroads to keep account[33]

[31]49 C.F.R. §1100.98.

[32]49 C.F.R. §1100.98(c).

II

The Suspension Powers Cannot Be "Separate and Distinct" for the Purpose of Judicial Review Since Each of the Powers Depend Upon the Other, Not Only for Existence, But for Interpretation of Limitations.

The lower courts are in general agreement that this Court's findings in *Arrow Transportation Company* v. *Southern Ry,* 372 U. S. 658 (1963) are sufficiently broad to foreclose entirely review of a decision not to suspend a rate publication. *Port of New York Authority* v. *U. S.,* 451 F. 2d 783 (2d Cir., 1971); *Delta Air Lines, Inc.* v. *C. A. B.,* 455 F. 2d 1340 (D.C. Cir., 1971); and *Municipal Light Boards* v. *F.P.C.,* 450 F. 2d 1341 (1971).

However, the lower court in this case, in direct conflict with the decision of the United States Court of Appeals for the District of Columbia in *Asphalt Roofing Manufacturers Assoc.* v. *Interstate Commerce Commission,* 567 F. 2d 994 (D.C. Cir., 1977), has determined

[33]In the opinion of railroads, this actually equates to an academic argument since the Commission is without authority to reject summarily a carrier-filed tariff on a disputed matter of substantive regulation. However, this recitation of procedural facts does show that the petitioners were not serious in their attempt to have the tariff actually rejected. Since the Division 2 decision could not be subject to judicial review, and since the lower court had delayed the effectiveness of the tariff, an expedited appeal to the full Commission was possible.

Also, a petition to reject a tariff publication is more closely akin to a petition to suspend than to a petition to investigate.

that the decision of the Commission electing not to investigate is reviewable. Neither the legislative nor the procedural history of the Section 15(7) [49 U.S.C. §10708] investigation powers support this position.

The common usage of the imprecise description "suspension order" in judicial decisions to identify all orders issued pursuant to Sections 15(7) [49 U.S.C. §10708] and 15(8) [49 U.S.C. §10707] is seriously misleading. Even an attempt at clearer, more exact, descriptions such as "investigation and suspension order" and "investigation order" can also be misleading since an "investigation order" can be an order issued pursuant to other sections of the Act, *e.g.*, Sections 13(1) [49 U.S.C. §11701] and 15(1) [49 U.S.C. §10704]. "Suspension order" then is an inexact reference that can be correctly understood only if the facts of the situation are known. The Commission in a "suspension order" *may* (1) suspend a filing pending investigation; (2) initiate an investigation under the statutory time limitation of seven months without suspending or (3) take no action.

Most of the judicial decisions do recognize the multiple opportunities available to the Commission under Sections 15(7) and 15(8), however, as evidenced by the fact that reference is inevitably made to "suspension *powers*" and not just to suspension *power*.

Indeed, if there has ever been any court challenge, and research does not reveal that there has been, to the ability of the Commission to exercise its discretion only to investigate without suspension, the addition of specific provisions for the imposition of a refund clause in

all orders setting a matter for investigation under Section 15(8) [49 U.S.C. §10707] answers the question.

The power to suspend and the power to investigate are statutorily linked administrative powers, each of which are wholly dependent upon the other. Without the power to suspend, the power to investigate under Section 15(8) would be a superflous addition to the investigative power available to the Commission under Section 13(1). Likewise, the power to suspend, except as an ancillary measure used in conjunction with an investigation, would give the Commission an unprecedented and extreme power to deny rate changes without making or intending to make a determination of lawfulness. These fundamental facts were recognized by Congress and resulted in a bifurcation of possible discretionary action, suspension/investigation, when the Commission's ability to suspend was expanded in the Mann-Elkins Act.[34]

The Mann-Elkins Act was passed on June 18, 1910. Debate on the bill emphasized that the Commission was neither a court nor an executive branch but a committee or arm of Congress exercising "administrative legislative functions."[35] The bill was designed to, and did when passed, empower the Commission on its own initiative to suspend rate changes up to ten months pending an investigation, and made railroads responsible for proving the reasonableness of both proposed increases and original rates. The final act "offered

[34] 36 Stat. 552 (1910).

[35] A. Hoogenboom, A History of the ICC (1976), p. 61.

something for everyone" and passed the Senate by a 60-12 vote.[36]

An issue that has a wide range of public and private attention, and resultant input, produces the best legislation and Section 15(7) suspension powers were a part of this kind of legislation. The principle of carrier initiation of rates *was preserved,* but restrictions were placed upon that principle in the interest of shippers. There was no question that Congress had "cut significantly into pre-existing rights of the carriers to set their own rates and put them into immediate effect. . . ." *T.I.M.E., Inc.* v. *U. S.,* 359 U. S. 464, 479 (1960). The passage of the Mann-Elkins Act (specifically the extension of the wholly discretionary suspension powers[37]) has been very carefully brought forward in both legislation and case law in a concerted and deliberate manner. A fact recognized by this Court in *Arrow.*

In *Long Island R.R.* v. *United States,* 193 F. Supp. 795, 800 (E.D.N.Y., 1961), the Court observed at page 99 that:

> "The objection to judicial review of suspension orders even on the most limited basis stem [primarily from the fact] that the mere possibility of resort to the courts may seriously interfere with the administrative agencies effective performance of functions of speed is of the essence."

[36] *Id.*

[37] *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907); *see also Board of Railroad Comrs.* v. *Great Northern R. Co.,* 281 U. S. 412, 429-430 (1930).

Review of a commission's determination not to investigate a rate publication under Section 15(8), if made by the courts, could result in the same interruption of the rate-making functions as that deemed objectionable by the court in *Long Island.* The lower court in this case reviewed the Commission's action in the same manner it would treat any other matter coming before it for review. The only reason given by the lower Court for dissolving its temporary stay was a balancing of equities in the railroads' favor under the traditional tests of *Virginia Petroleum Jobbers Association* v. *F.T.C.,* 295 F. 2d 921 (D.C. Cir. 1958).[38] Had the court determined on the limited record before it that the equities were with the petitioners it would have continued the stay and thereby suspended the rates even though in its decision it notes that respectful authorities support the contention that a Commission decision not to suspend the operation of a tariff is not subject to judicial review. The reference to respectful authority is, of course, this court's determination in the *SCRAP I* case and in *Arrow.* The lower Court failed to note the fact that in both of those cases this Court determined that the power to suspend rates was exclusive to the Commission and that Congress intended to withdraw from the judiciary any pre-existing power to grant injunctive relief against the operation or non-operation of such rates. The only other logical consequence of courts having the ability to review a determination not to investigate would be to nullify the time restrictions for investigation under Section 15(8).

[38] Appendix, p. 300.

The seven-month investigation limitation could not possibly accommodate both a court review and a Commission review. It is not rational to presume that Congress intended for the §15(8) powers of investigation to extend jointly to the Commission and the courts.

III

A Protestant to a New Rate Publication Has Not Exhausted Its Administrative Remedies by the Filing of a Protest Under Section 15(8) of the Interstate Commerce Act Requesting Suspension and Investigation.

It obviously would be unfair to a protestant to a new rate publication if his only opportunity to approach the Commission was at the suspension level. The previous outline of the manner in which the preliminary review must be made indicates how totally unfair the result would be. However, if the Commission is forced to expand the suspension stage of ratemaking to the level of an adjudicatory proceeding, it would appear that a protestant to a rate increase would be forced to elect to challenge a rate prior to effectiveness or after effectiveness. And that, a decision, a final decision, at the suspension level would be *res adjudicata* to the filing of a complaint under other provisions of the Act. There can be only one final decision on any matter by the Commission and presumably if a decision not to investigate is reviewable, the courts would likewise determine that a decision to investigate would be reviewable.

Obviously, the same situation which existed prior to the passage of the Mann-Elkins Act would again exist.

The courts would determine which cases would be heard and which cases would not be heard. The Commission would simply be an arm of the judiciary awaiting instructions on how it should progress rate regulation. The alternative, of course, would be for protestants to avoid filing a protest under Section 15(8) and then fiiing pursuant to either Sections 13(1) or 15(1), and again the situation would be precisely the same as it was prior to 1910.

Practically, the lower court's decision has the effect of eliminating the unique suspension stage of railroad ratemaking. The decision says very simply that the Commission must always investigate a rate publication if it is protested.[39] That would be the only safe action that the Commission could take to protect its jurisdiction. The consequence of this type of handling should be obvious. The Commission would simply issue a boilerplate notice of investigation on each publication and then simply not pursue the investigation and, therefore, allow the rates to stay in effect, avoid court intereference, and yet not accomplish the true purposes for which the suspension stage of ratemaking is designed. One of which is to at least notify the railroads that there are possible problems with the publication that should be given consideration and corrected to avoid a finding of unlawfulness.

Congress has made an admirable attempt to reach a solution to an overwhelming administrative task that would be fair both to the public and to the railroads.

[39]The Commission would be forced to put aside entirely the requirements of §15(8) that place a burden on Protestants to show irreparable harm and probability of success on the merits.

It is clear that great care was exercised to guarantee that the Commission would not be restrained in its use of this exclusive power. Again referring to the decision in *Arrow,* at page 667, this Court said:

> "We cannot believe that Congress would have given such detailed consideration to the period of *suspension* unless it meant thereby to vest in the Commission sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief."

The basic purpose of Section 15(8) powers, whether they are exercised or not, is to prevent the courts, through premature and uneven adjudication, from entangling themselves in disagreements over the technicalities of rate publications, and also to protect the Commission from judicial interference until a final administrative decision on the lawfulness of a publication has been made.[40]

The Protestants to the Commission Did Not Exhaust Their Administrative Remedies, Another Reason Why the Matter Should Not Have Been Entertained by the Lower Court.

Fundamentally, even though the lower court did weigh the evidence itself and determine that it was sufficient to justify an investigation, exhaustion of administrative remedies remains one of the primary questions with which this Court must be concerned.

[40]In *Great Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285 (1922), this Court held that if construction of the tariff presented solely a question of law, the court had jurisdiction, but if it involved a question of fact or of discretion in technical matters, the Commission had *exclusive* jurisdiction.

Exhaustion of administrative remedies is a condition precedent to judicial review. In *Aircraft & Diesel Equipment Co.* v. *Hirsch,* 331 U. S. 752, 772 (1960), this Court said:

> "Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action, it would nullify the congressional objective in providing the administrative determination."

This Court must remember that the Commission made no determination except that it would not exercise its discretionary 15(8) powers.

On an incomplete record, the lower court became the Interstate Commerce Commission. In its initial order it suspended the rates by issuing a temporary stay [as only the Interstate Commerce Commission can do under Section 15(8)(a)]; in its second order it determined the equities of extending the injunction and again exercised the Section 15(8) powers by requiring an accounting; and finally, made a determination on the weight to be afforded the evidence which had been placed before the Commission during the suspension

stage.[41] The court superimposed its own findings upon those of the Commission by stating that the Commission had determined the rate to be lawful and finally carried through on its initial use of the Section 15(8) powers by setting the entire matter for investigation. Clearly the lower court was acting, not as a reviewing court, but as the Commission.

The lower court does not find that the Commission was arbitrary or capricious nor does it find that there was a disregard for the statutory limitation of the suspension powers granted to the Commission. The court simply finds that the matter should be investigated. Only the Interstate Commerce Commission is vested with the legislative ability to institute an investigation. A court cannot function in a legislative capacity.[42] Further, the lower court has taken the unusual step of remanding a case to a body that never took the case in the first place.

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[41] While there may be difference of opinion concerning weight which should be accorded certain evidence by the Commission, Courts may not usurp the administrative function of the Commission by overruling and substituting their own appraisal of the facts and evidence of a case. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 471 (1909); *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919); *United States* v. *New River Co.*, 265 U. S. 533, 542 (1924); *New York* v. *United States*, 331 U. S. 284, 349 (1947).

[42] *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.*, 284 U. S. 370 (1931).

Petitioners to the Court Had Failed to Exhaust Administrative Remedies Which Were Not Waived by the Interstate Commerce Commission.

The lower court's decision is in error in its characterization of the review that a petitioner would receive under Section 13(1) of the Interstate Commerce Act. Unlike the characterization made by the court that the Interstate Commerce Commission apparently "limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal," [Appendix, p. 312] a complaint filed under that section of the Act is very broad in scope and allows a petitioner to set the scope of review by his application. This court has indicated that the doctrine of exhaustion of administrative remedies is "well established. *McKart* v. *United States*, 395 U. S. 185, 193 (1959). It is also well established that the primary purpose of the exhaustion doctrine is the avoidance of premature interruption of the administrative process and the fact that it is generally more efficient for the administrative process to go forward without interruption. In this case, administrative autonomy is especially desirable because *administrative discretion and expertise* are required. Generally speaking, the exceptions to the exhaustion doctrine run to a situation where irreparable harm will be occasioned to the petitioner and he has no other appropriate recourse to take. Railroads urge the Court to note the absence of any claim of irreparable harm or injury claimed by the protestants to the Commission as a result of any of the patent illegalities which the Court has judged exist. This is

especially so in regard to the Section 4(1) issue since there is no question that if any harm would be occasioned to any of the involved parties, or any other party affected by the rate, a finding would be made against the railroads by the Commission on complaint and damages would be awarded under the Act.[43]

It is especially important that the Court carefully review this particular point since there is an apparent attitude that injury could not be avoided by the protestants. That simply is not true. As a matter of fact, the lower court specifically made just that finding when it dissolved its temporary stay (the equivalent of dissolving a suspension order) after a review of the verified statements presented to them. At that point the court should have acknowledged its lack of jurisdiction. If it had done so, the petitioning parties undoubtedly would have filed the necessary complaint with the Commission and a final resolution of the complaint/complaints would have *been made appropriately by the Commission by now.*

There have been recent holdings by this Court that indicate that there is a feeling that the ability of agencies to waive exhaustion of remedies is desirable. *Matthews* v. *Eldridge,* 424 U. S. 319 (1976). However, this general trend requires specifically that the administrative agency involved does not assert a lack of exhaustion as a ground for opposing review. The Interstate Commerce Commission most emphatically did assert the exhaustion doctrine before the lower court.

[43]49 U.S.C. §8.

It is especially disturbing to railroads that the lower court interrupted the administrative process in this particular case. The promise of flexibility in ratemaking under Section 15(17) had encouraged the railroads to experiment with its rates to determine if a proper incentive could be developed to help them not only with their revenue problems but with their acknowledged car shortages.[44] Chairman O'Neal had indicated that indeed the Commission had internally reviewed the grain situation and determined that application of demand-sensitive rates was particularly appropriate. [Appendix, pp. 78-81.] It is impossible to put before a court on untimely appeal a general feeling for the expertise available within the Commission on a certain subject. The unadorned record does not indicate to the Court the type of consideration which the Commission is capable of giving to any commodity rate increase on informal review. The input of experts who have worked with a particular situation for an extended period of time cannot be reflected in a hastily-prepared order, hastily prepared because of absence of time, designed more to notify the public of a decision than to make a finding.

[44]The lower Court interference is in direct conflict to The National Transportation Policy, 49 U.S.C. §10101, especially in view of the intent of the 4R Act.

CONCLUSION

Railroads respectfully urge this Court to recognize that the lower court has totally misconstrued the ratemaking scheme of the Interstate Commerce Commission, that it has injected itself unnecessarily into the administrative process and by doing so has severely interrupted the efficiency of the agency process in reaching some final conclusions on a very important railroad ratemaking matter.

The decision of the lower court should be reversed.

Respectfully submitted,

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